

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1369

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH J. GAY,
Defendant-Appellant.

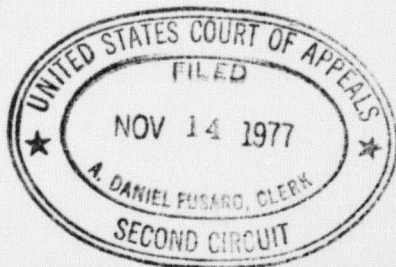
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF

RAICHLE, BANNING, WEISS & HALPERN,
Attorneys for Defendant-Appellant,
10 Lafayette Square,
Buffalo, New York 14203.

R. WILLIAM STEPHENS,
Of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
30 CENTER ST., BATAVIA, N. Y. 14005
716-343-0487, 716-344-2000



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UNITED STATES OF AMERICA,
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vs.

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Defendant-Appellant.

REPLY BRIEF
Preliminary Statement

We have received the brief of the Government in this case and while it generates considerable heat, it sheds very little light on the issues involved in this appeal. The Government chooses to state in conclusory fashion that the argument of the appellant is "totally ridiculous and without merit" (Government Brief p. 28) and again refers to a ridiculous argument (Government Brief p. 45) and seeks to buttress its conclusion by capitalizing the word, italicizing it, and adding an exclamation point. Elsewhere the Government assails the reasoning in the defendant's brief and calls it "faulty" (Government Brief p. 36) and then at both pages 47 and 49 claims that the appellant seeks by repetition to convince this distinguished court to adopt an erroneous principle of law.

The fact of the matter is, however, that it is the Government's brief which is repetitive. In sum and substance, the Government takes the position that the entire case involves a jury question concerning the \$2,000.00 cash on hand. Fortunately (or unfortunately depending on your point of view) neither life nor this case* is so simple.

POINT I

The Appellant's Contentions Are Meritorious; The Case Suffers From All The Defects Outlined In *Holland v. United States*; The Government Did Not Establish Anything With Reasonable Certainty As Required Even In Expenditure Cases.

The Government rises above modesty in its brief at page three where it informs this Court that it is submitting a "legal treatise" on the subject of the expenditures variant of the net worth theory. We are underwhelmed by the Government's submission. It would seem to us that a legal treatise on a variant of the net worth theory should mention the landmark case of *Holland v. United States* sometime before page 52 of its 56 page submission. We do not believe that this Court needs a legal treatise on criminal tax cases, but we think it instructive to quote at length from *Holland v. United States* regarding the care which must be taken when criminal guilt is sought to be proved by inferences from circumstantial facts. The Supreme Court stated in *Holland v. United States*, 348 U.S. 121 at 125-129, as follows:

* Which appellee elsewhere characterizes as "complicated as to the evidence presented and as to the legal theory involved" (Government Brief p. 3).

"Before proceeding with a discussion of these cases, we believe it important to outline the general problems implicit in this type of litigation. In this consideration we assume, as we must in view of its widespread use, that the Government deems the net worth method useful in the enforcement of the criminal sanctions of our income tax laws. **Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use.**

"One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have prima facie validity, **the prosecution must always prove the criminal charge beyond a reasonable doubt.** This has led many of our courts to be disturbed by the use of the net worth method, particularly in its scope and the latitude which it allows prosecutors. E.G., *Demetree v. United States*, 207 F2d 892, 894 (1953, CA5th Fla); *United States v. Caserta*, 199 F2d 905, 907 (1952, CA3d Pa); *United States v. Fenwick* (CA7th Ind) 177 F2d 488.

"But the net worth method has not grown up overnight. It was first utilized in such cases as *Capone v. United States*, 51 F2d 609, 76 ALR 1534 (1931, CA7th Ill) and *Guzik v. United States*, 54 F2d 618 (1931, CA7th Ill), to corroborate direct proof of specific unreported income. In *United States v. Johnson*, 319 US 503, 87 L ed 1546, 63 S Ct 1233, *supra*, this Court approved of its use to support the inference that the taxpayer, owner of a vast and elaborately concealed network of gambling houses upon which he declared no income, had indeed received unreported income in a 'substantial amount.' It was a potent weapon in establishing taxable income from

undisclosed sources when all other efforts failed. Since the Johnson Case, however, its horizons have been widened until now it is used in run-of-the-mine cases, regardless of the amount of tax deficiency involved. In each of the four cases decided today the allegedly unreported income comes from the same disclosed sources as produced the taxpayer's reported income and in none is the tax deficiency anything like the deficiencies in Johnson, Capone or Guzik. The net worth method, it seems, has evolved from the final volley to the first shot in the Government's battle for revenue, and its use in the ordinary income-bracket cases greatly increases the chances for error. This leads us to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases.

"1. Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention. **However, taxpayers too encounter many obstacles in convincing the jury of the existence of such hoards.** This is particularly so when the emergence of the hidden savings also uncovers a fraud on the taxpayer's creditors.

"In this connection, the taxpayer frequently gives 'leads' to the Government agents indicating the specific sources from which his cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc. Sometimes these 'leads' point back to old transactions far removed from the prosecution period. Were the Government required to run down all such leads it would face grave investigative

difficulties; still its failure to do so might jeopardize the position of the taxpayer.

"2. As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; **bare figures have a way of acquiring an existence of their own**, independent of the evidence which gave rise to them.

"3. Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he may be entirely honest and yet **unable to recount his financial history**. In addition, **such a rule would tend to shift the burden of proof**. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or **losing the jury** through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. **But the courts must minimize this danger.**

"4. When there are no books and records, willfulness may be inferred by the jury from that fact coupled with proof of an understatement of income. But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified especially where the circumstances, surrounding the deficiency are as consistent with innocent mistake as with willful violation. On the

other hand, the very failure of the books to disclose a proved deficiency might indicate deliberate falsification.

"5. In many cases of this type, the prosecution relies on the taxpayer's statements, made to revenue agents in the course of their investigation, to establish vital links in the Government's proof. **But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth.** Moreover, the prosecution may pick and choose from the taxpayer's statement, relying on the favorable portion and **throwing aside** that which does not bolster its position. **The problem of corroboration, dealt with in the companion cases of Smith v. United States, infra, and United States v. Calderon, p. 202, therefore becomes crucial.**

"6. The statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in **relating that income sufficiently to any specific prosecution year.** While a steadily increasing net worth may justify an inference of additional earnings, **unless that increase can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent.**

"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. *Universal Camera Corp. v. N.L.R.B.*, 340 US 474, 489, 95 L ed 456, 468, 71 S Ct 456. **Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.** Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of

the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. **Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.**" (Emphasis added).

The case under review suffers from all of the infirmities the Supreme Court warned against in *Holland v. United States*. It particularly violates the over-riding principle expressed there that the prosecution must prove the charge beyond a reasonable doubt. It is an example of how the use of the net worth method or any variant increases the chance for error; the risk that the taxpayer defendant runs in convincing the jury of the excess of cash accumulations; the assumptions which equate expenditures with taxpayer income and their many weaknesses; the difficulty of the taxpayer (especially one with an eighth grade education) to recount his financial history; the problem of corroboration of the taxpayer's statements and the problems of relating income to specific prosecution years.

Consider for a moment the attempts of the Government in its brief at pages 19 and 20 to "simply state" the expenditures theory (135 words). To read the statement aloud is sufficient answer to the Government's claim that the appellant's contentions are ridiculous. Besides that is the important fact that when all the convoluted calculations and adjustments are made, it is only an *inference* that can be drawn that the excess is attributable to undeclared taxable income.

Furthermore, it would seem that this is an appropriate place to treat the argument of the Government that the defendant, armed with his eighth grade education should have been learned enough to advise the Government of his expenditures

from cash when he heard the magic words "net worth investigation" (see Government Brief p. 40). The fact of the matter is that there are few who would be able in the absence of a specific inquiry to know that the Government was inquiring about such things and as the memorandum of conference which is an appendix to the Government's brief demonstrates at page A2, the Government was advised that the increases were "due to the expenditures of cash accumulated in prior years". The Government then is wrong on both scores. First, in claiming that they had no indication that prior cash accumulations accounted for the excess of expenditures over income, or second, that a man with an eighth grade education could understand the net worth expenditures theory to such a point.

The Government attempts to indicate that it is the appellant's contention that a formal net worth statement is required in an expenditures case. The Government ignores our brief at page 20 where we explicitly disavow any such claim. We agree that the quoted statement from *United States v. Penosi*, 452 F. 2d 217 (5th Cir. 1971) that:

"Requiring the Government to show an opening net worth is simply a requirement that the Government prove to a reasonable certainty *that the income expended* did not spring from *prior accumulations* or earnings from which the defendant would not be liable in taxes." (Emphasis supplied).

This is exactly and precisely what the Government failed to prove in this case. The prior accumulations were shown by the cash mortgages made by the defendant over the many years including the indictment years which the record shows totalled over \$129,000 (see appellant's brief p. 38) and were testified to in many cases by the recipient of the cash loan and

were stipulated to by the Government (see Government Brief p. 455). The mere proof by the Government of expenditures in excess of declared taxable income was insufficient. The Government in this case not only did not establish that expenditures were not from prior cash accumulations, but by stipulating to the cash mortgage activity of the defendant over the past 20 years agreed to that fact.

POINT II

The Omissions From The Government Brief Are Significant.

The Government brief demonstrates the merit of the appellant's contentions as much from its omissions as from what is included. There is no claim anywhere in the Government brief that it demonstrated a likely source of taxable income*. It attempts to take some solace in the fact that it negated non-taxable sources which it patently did not do (see *infra* Point III). Additionally, the Government nowhere explains how the \$2,000.00 cash on hand statement is properly accounted for in its various charts, graphs and calculations. As we have already mentioned in our main brief at page 36 the Government, by adding and subtracting \$2,000.00 for each of the indictment years, made a meaningless accounting entry regarding this amount. If the defendant had told the Government of his six figure cash accumulation and the Government had added and subtracted that amount at the beginning and end of each indictment year, it would make no difference in the Government's convoluted calculations.

* And no justification for the prosecutor's comment to the jury encouraging them to speculate about likely sources of income (see Government Brief p. 50 and our main brief at pp. 44 and 45).

The Government additionally fails to explain why the expenditures method of proof was used rather than the net worth method where the justification for the use of the expenditures method as stated in *Taglianetti v. United States*, 398 F. 2d 558, 562 (1st Cir. 1968) does not apply. See our main brief at page 14, footnote.

POINT III

The Government Did Not, With Reasonable Certainty, Negate Nontaxable Sources Including Prior Accumulations.

The Government repeatedly chides the appellant for attaching "too much significance to prior mortgage activity" (see Government Brief pp. 33 and 35). The Government forgets the fact that it stipulated that this prior mortgage activity took place and that the records of the Erie County Clerk's Office and the testimony of the recipients of the cash loans testified to such activity. The Government would choose to ignore this altogether in claiming that it negated nontaxable sources including prior accumulations. The Government attempts to mislead this Court where at page 25 and again at page 26 of its brief it makes the claim that the defendant "only earned \$63,000.00 between the early 1940's and 1966". This is in complete error. The testimony, by Agent Quinn and Agent Russo, was that the earnings subject to Social Security taxation of the defendant were \$63,000.00. That is, that his earnings during those years subject to Social Security taxes was in that amount. An examination of the transcript indicates that the mis-statement in the Government brief regarding this important fact is intentional. At page 358 the prosecutor questions Special Agent Quinn as follows:

"Q. What were his earnings from 1945 through 1966?

A. As I recall it was approximately \$63,000.00."

Immediately thereafter, defendant's attorney's first question was as follows:

"Q. That would be \$63,000.00 that Social Security was declared on, isn't that right?

A. According to the records of the Social Security, yes sir."

Again at pages 555 and 556 defendant's attorney questioned Agent Russo concerning this \$63,000.00 figure obtained from Social Security:

"Q. What are Social Security earnings?

A. Wages.

Q. Well, wages to what extent?

A. To the taxability of Social Security.

Q. Which is how much?

A. Well, back in those years it could have been \$3,600, \$3,000 or \$3,600, I don't remember which.

Q. All right, so that from '45 when you spoke of wages all Social Security could tell you was that if you made the \$3,600 that that year you made at least \$3,600, isn't that true?

A. For Social Security purposes this was all you were subject to Social Security taxes.

Q. Taxes?

A. That's correct.

Q. So that from '45 to '69 if there were sixty some thousand dollars we would have to know, would we not, what the Social Security limits were on wages in imposing this tax, isn't that true?

A. If you want to arrive at some kind of an income figure over and above the Social Security wages, yes, you would have to know that.

Q. All right, so as far as you are concerned, that particular testimony or the complete testimony of wages

earned from '45 through the taxable years is not here in the courtroom in evidence, is it?

A. I think he read that off his memorandum.

Q. I know it came from his memorandum and he said he had contacted the Social Security people, he didn't know what year Mr. Gay started or what, isn't that right; do you recall that testimony?

A. Yes, I remember because he wasn't too sure.

Q. He wasn't certain.

A. He went back to something like 1945 or '43.

Q. I see, but all they would have reported to him was like say '45, the year '45, let us take that as an example, all they could say if he made more than \$3,600 was that he made thirty-six hundred, isn't that true?

A. That's correct."

It is immediately apparent from the above that the \$63,000.00 figure is the amount of income of Mr. Gay from the 1940's through the 1960's which was subject to Social Security taxes and does not in any way indicate his total taxable income for those years. Yet, the Government continually refers to this as his earnings and there was no evidence presented by the Government that indicated his earnings for those periods. It is this stark fact which the Government attempts to pass off on this Court (and the jury in the district court) as total earnings which demonstrates that the Government did not negate prior accumulations during the pre-indictment period and thus, did not negate nontaxable sources*.

* There is one thing with which we can agree with the Government and that concerns Judge Curtin's comment that the "Expenditures system just seems to be a very sloppy way of proving net worth" (TR. p. 758). The Government states that Judge Curtin was "commenting on the expenditures theory in general" rather than the theory as applied in this case. We believe that a further reading indicates that he was doing both, but if we are wrong in that we agree with the Government and with Judge Curtin concerning the sloppiness of an attempt to prove guilt beyond a reasonable doubt from inferences drawn from circumstantial evidence.

It is this which demonstrates that the Government failed to negate nontaxable sources in compliance with the recognized rule that:

"in cases where the expenditures method of proof is employed the Government must present evidence that sufficiently excludes the possibility that the defendant relied on previously accumulated assets rather than on unreported taxable income."³

³ This requirement implements the rule that in circumstantial evidence cases the Government must introduce evidence from which the jury might reasonably conclude that every reasonable hypothesis has been excluded but that of guilt. E.g., *United States v. Willoz*, 449 F.2d 1321, 1323 (5th Cir. 1971); *Vick v. United States*, 216 F.2d 228, 232 (5th Cir. 1954)."

United States v. Marshall, 557 F.2d 527 (5th Cir. 1977).

This is the legal principle we rely upon under Point III of our main brief.

POINT IV

The \$2,000.00 Cash On Hand Statement Was Un-corroborated.

The statement of the taxpayer defendant made during the fifth of six interviews designed and calculated by the Government agents to euvre the defendant into a trap to make their case, was not corroborated and the Government admits it at page 38 of its brief. It claims, however, that there was evidence that the cash hoard did not exist which is not so, but even if it were so, would not be sufficient under the decided cases for corroboration. We have previously cited to the court the leading cases requiring such corroboration including *Holland* and what the Government repeatedly cites as *United*

States v. Calderen [sic] (Government Brief p. 25). The Government again returns to its erroneous argument that corroboration was supplied by the fact that he had total earnings subject to Social Security taxes of \$63,000.00 during the 20 some years prior to the indictment years. We have previously pointed out the error of that statement and again point to the fact that nowhere in the record was there evidence of the total prior earnings of the defendant.

The Government is forced into making extravagant claims regarding the evidence in the case on this point by claiming at page 39 of its brief that all of the evidence pointed to the non-existence of a cash hoard which is obviously not so and further by stating at page 27 that it is "inconceivable" that a man who earns his living by investing would forego the additional income he could receive on the \$100,000.00. It is not inconceivable and this is borne out by the cash mortgage loans which he made and which were recorded in the Erie County Clerk's Office and which were stipulated to by the Government. Even this puts aside the extensive testimony of the defendant's relatives and friends concerning the existence of the money.

POINT V

The Government Attempt To Distinguish The Bethea Case Fails.

In *United States v. Bethea*, 537 F. 2d 1187 (4th Cir. 1976) a conviction for the same crimes after a bench trial was unanimously reversed by the Fourth Circuit. We include as an Appendix to this reply brief the memorandum opinion of the district judge which was reversed by the Fourth Circuit. The grounds for reversal was that the Government had failed to prove the case beyond a reasonable doubt as a matter of law.

This is so in spite of the fact that the district judge made findings of credibility with respect to the defendant Bethea adverse to him and in spite of the fact that the district judge found a likely source of income during the years in question (see Appendix). The Government states that the case is "easily distinguishable" when manifestly it is not. The Government claims that the cash hoard was objectively verifiable because of the safe deposit box. Querie why Mr. Gay's cash accumulations are not verifiable from the extensive evidence of cash mortgage loans recorded in the Erie County Clerk's Office and testified to by the recipients of the loans. We also dispute the statement of the Government that the proof of the defendant Gay's investment is totally inconsistent with the existence of a cash hoard. We have demonstrated in our main brief that by reason of Mr. Gay's experience in life, the keeping of cash is totally consistent with such experience.

The Fourth Circuit reversal of *Bethea* is evidence of the uneasiness of appellate courts consistent with the admonition to them in *Holland v. United States, supra*, that convictions which seek to prove criminal guilt beyond a reasonable doubt from inferences flowing from circumstantial evidence will be closely scrutinized in a manner consistent with the presumption of innocence which is accorded to defendants generally under our system of justice. There should not be a double standard of presumed innocence with respect to white collar felony tax charges. A defendant in a criminal tax case should be accorded all of the presumptions that the law accords airplane hijackers, bank robbers and interstate extortionists. The Government is required to prove its case against a suspected tax chisler beyond a reasonable doubt.

Illustrative of the fact that the Government in this case has fallen into the error of treating this criminal tax prosecution as if it were a civil fraud case is the remarkable statement at

page 46 of its brief implying that the *defendant* "can point to no paybacks of any one of these mortgages or combination thereof during the indictment years which explains the excess of expenditures". Does the Government have to be reminded in the face of all that has been said that a defendant in a criminal case is required to prove nothing? This is the exact type of thing our highest court warned against in *Holland v. United States* when it said: "Such a rule would tend to shift the burden of proof".

Conclusion

For all of the above reasons and those expressed in our main brief the conviction of the defendant should be reversed.

Respectfully submitted,

RAICHLE, BANNING, WEISS &
HALPERN,
Attorneys for Appellant,
10 Lafayette Square,
Buffalo, New York 14203,
Tel.: (716) 852-7587.

R. William Stephens,
Of Counsel.

APPENDIX

District Court Memorandum in *United States v. Bethea*

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Virginia
Norfolk Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM EDWARD BETHEA,

Defendant.

Criminal Action
No. 74-145-N

The United States charges, in a two count indictment, that the defendant, William Edward Bethea, did wilfully and knowingly attempt to evade and defeat the income tax due and owing by him for the calendar years 1971 (Count I) and 1972 (Count II), by (a) failure to file a return; (b) failing to pay the tax due and owing; (c) by concealing his true and correct taxable income; (d) by failing to keep adequate and proper records; (e) by the use of large cash expenditures; (f) by placing assets acquired by him in the names of nominees;

*Appendix—District Court Memorandum in United
States v. Bethea.*

and (g) by attempting to deceive agents of the internal Revenue Service.

The matter was tried by the Court on the defendant's jury waiver. The Government's evidence proceeded on the "net worth theory."

The defendant admitted that he did not file income tax returns for the calendar years 1971 and 1972. He claimed, however, that his cash expenditures and his acquisition of assets in those years came from cash stashed away in the defendant's safe deposit box at the request of the defendant's brother, Vernon Bethea, a narcotics dealer, and now deceased. The defendant testified that his brother, Vernon, during 1969 and up to his death in June, 1970, gave him sealed envelopes to keep in the safe deposit box, but with oral instructions to treat anything that remained upon his, Vernon's, death as the property of the defendant. Likewise, the defendant says he was instructed by Vernon that any money in a steel box in his brother's New York apartment was to go to the defendant.

Vernon Bethea, the brother, was stabbed to death in New York City on July 13, 1970. The defendant, William Edward Bethea, now claims that he found \$3,000 in cash in Vernon's apartment and about \$53,000 in cash in envelopes in the safe deposit box. This cash hoard, he says, was the source of the proved increase in net worth.

We find the defendant's assertions to be inherently incredible, and not worthy of belief.

*Appendix—District Court Memorandum in United
States v. Bethea.*

We further find:

1. That the defendant failed to file an income tax return for the calendar years 1971 and 1972.
2. That the defendant failed to pay income taxes for each year that were properly due and owing to the United States.
3. That the defendant concealed his true and correct taxable income.
4. That the defendant failed to keep adequate and proper records.
5. That the defendant used the mode of large cash expenditures to conceal his true income.
6. That the defendant placed assets belonging to himself in the names of nominees to conceal his ownership thereof.
7. That the defendant attempted to deceive agents of the Internal Revenue Service.

We find that the defendant has been proved guilty beyond all reasonable doubt as charged and is specifically guilty as charged in Count I of the indictment, and guilty as charged in Count II of the indictment.

The evidence clearly showed beyond all reasonable doubt that the defendant, in the years in question, had a source of income as a carpenter. He, himself, estimated his income from that source on credit applications signed by him during the years in question as \$250.00 per week. He bought several

*Appendix—District Court Memorandum in United
States v. Bethea.*

automobiles, the purchase prices of which were in excess of \$12,000, all documented in the names of nominees. One 1971 purchase was a 1972 Buick costing over \$8,000 and titled in the name of a friend, Helen Crocker. The Court placed no credence in the claim that his prior criminal conviction or placing of insurance coverage dictated such action.

The purchase of a lot for \$5,000 and building materials for \$7,527.35 with funds ostensibly belonging to Wilson B. Hill, an uncle, but now agreed to have been the defendant's money, we find to have been done to hide assets of the defendant.

Without reviewing the evidence in detail, we find the defendant's statement to Agent Rowe of the Internal Revenue Service on May 8, 1973, to be nearer the truth, *i.e.*, that he knew he had failed to file tax returns and that he knew he owed a tax. Further, he said that he had received only \$2,000-\$3,000 from his brother, and not \$53,000 as he now claims.

The defendant is directed to appear in this Court at 2:00 P.M., MONDAY, JANUARY 27, 1975, for a formal finding in his case. At that time, the defendant will be allowed to continue under his present bond pending preparation and receipt of a presentence report.

It is so ORDERED.

s/ JOHN A. MacKENZIE,
United States District Judge.

Norfolk, Virginia
January 21, 1975.

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.

vs

Joseph J. Gay

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1369

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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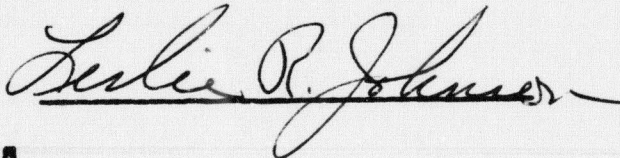
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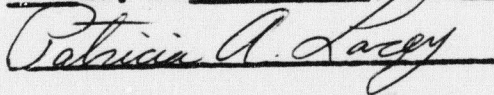
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10 Lafayette Square, Buffalo, New York 14203



Sworn to before me this

12th day of November, 19 77



PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978